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In The
Supreme Court of the United States

PATRICIA A. WESTON, on behalf of herself and all others similarly situated,
Petitioner,

v.

AMERIBANK, a State Savings Bank,
Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI
with Appendix

* JOHN E. ANDING (P30356)
CHRISTOPHER G. HASTINGS (P40861)
Drew, Cooper & Anding
125 Ottawa Avenue, N.W.
Suite 300, Ledyard Building
Grand Rapids, Michigan 49503

616/454-8300

Attorneys for Petitioner
**Counsel of Record*

December, 2001

LEGAL ADVANTAGE • 432 Walnut Street • Cincinnati, OH 45202
(800) 581-2252

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QUESTION PRESENTED FOR REVIEW

Does the filing of a class action toll statutes of limitation applicable to class members' related claims when those related claims were not successfully joined in the initial class action due to the statute of limitations applicable to the claim of the initial class representative?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at Weston v. AmeriBank, 265 F.3d. 366 (6th Cir. 2001) [Appendix A]. The opinion of the District Court in Weston v. AmeriBank, No. 1:99-cv-698, 1999 U.S. Dist. LEXIS 20287 (W.D. Mich. 2000) is not reported [Appendix B].

BASIS FOR JURISDICTION

This petition seeks review of a judgment of the United States Court of Appeals for the Sixth Circuit entered September 7, 2001. This petition is timely filed within 90 days of that date as provided by Rule 13. Jurisdiction of this Court is founded on 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOVLED

Title 15 U.S.C. §1640(e) states:

> "Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year of the date of the violation . . . ."

STATEMENT OF THE CASE

On April 1, 1998, Patricia A. Weston closed a loan with AmeriBank. The bank charged Weston a $350 document preparation fee. Weston alleges that the $350 document preparation fee violates the Truth in Lending Act, 15 U.S.C. §§1605a and 1638 ("TILA") because it was neither "bona fide" nor "reasonable in amount" as provided in 12 C.F.R. §226.4(c)(7), and was not properly disclosed as a finance charge.

On December 21, 1998, Paul and Theresa Dressel ("Dressels"), acting on behalf of a class of similarly situated borrowers which included Weston, filed a complaint in Michigan's Kent County Circuit Court alleging that AmeriBank violated Michigan law by charging them an inappropriate document preparation fee. The Dressels claimed that AmeriBank violated Michigan's statutory prohibition against the unauthorized practice of law by charging them a $400 document preparation fee on their November 17, 1997 loan. On March 22, 1999, the state circuit court certified the Dressels' case as a class action. On July 2, 1999, before any class notice was

disseminated, the circuit court dismissed the case, holding that AmeriBank had not engaged in the unauthorized practice of law.[1] The Dressels moved for reconsideration and sought leave to amend their complaint to include, among other things, a TILA claim. On September 3, 1999, the state circuit court denied both requests, holding that the Dressels' TILA claim was barred by the TILA's one-year statute of limitations because the Dressels' complaint was filed on December 21, 1998, more than thirteen months after their November 17, 1997 loan, and that the doctrine of equitable tolling did not save the claim.

Weston filed this action on September 10, 1999, seven days after the state circuit court denied the Dressels' request for reconsideration and leave to amend their complaint and one year and seven months after closing her loan with AmeriBank. Whether her claim was timely turns on whether the

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[1] This Opinion was recently reversed by the Michigan Court of Appeals at Dressel v. AmeriBank, 247 Mich. App. 143; ____ N.W.2d. ____, 2001 Mich. App. LEXIS 163 (Mich. App. 2001) [Appendix C].

one year statute of limitations found in 15 U.S.C. §1640(e) was tolled by the Dressel suit.

AmeriBank moved the district court to dismiss Weston's complaint, arguing that her TILA claim was barred by the one-year statute of limitations contained in 15. U.S. C. §1640(e). The district court treated AmeriBank's motion as a motion for summary judgment and dismissed Weston's TILA claim based upon twin grounds. First, the district court held that, while Crown Cork & Seal Co. v. Parker, 462 U.S. 345 (1983) and American Pipe and Construction Co. v. Utah, 414 U.S. 538 (1974) saved Weston's individual claim from expiring due to the pendency of Dressel, these cases did not permit her to assert her claims as a class action. Further, the district court held that Weston's individual claim, while not time-barred, was barred by the Michigan state court's order refusing to allow the Dressel plaintiffs to amend their complaint to assert TILA claims, under the doctrine of *res judicata*.

Weston appealed to the Sixth Circuit, arguing that the cases upon which the district court relied

(including, significantly, Andrews v. Orr, 851 F.2d. 146, 149 (6th Cir. 1988)) applied only when certification of a previous class action was denied. Weston further argued that the district court's *res judicata* analysis was misguided because only the time bar applying to the class representative's claim was litigated in Dressel.

While Weston's appeal pended, the Ninth Circuit handed down its *en banc* opinion in Catholic Social Services, Inc. v. INS, 232 F.3d. 1139 (9th Cir. *en banc* 2000), which in Weston's view vindicated the distinction she wished to draw between her case and Andrews v. Orr, *supra*, and flatly held that a previous class action where class certification was not denied tolled the statute of limitations and did not prevent certification of a second class action. Catholic Social Services was squarely on point to the issues as framed by the district court and the parties on appeal.

The Sixth Circuit did not reach the issues framed by the district court, the parties, and Catholic Social Services. Although its opinion is styled as

"affirmance" of the district court, the Sixth Circuit rejected the district court's acknowledgment that:

> "the filing of a class complaint tolls the statute of limitations for absent class members, both for claims actually alleged and those growing out of the same conduct, transaction and occurrence."

District court opinion. [Appendix B, p. B - 8]. The Sixth Circuit held that the Dressel case could not save Weston's TILA claim because the Dressel class representative's own TILA claim was time barred [Appendix A, p. A-6]. This holding is at odds with the Second Circuit's holding in Cullen v. Margiotta, 811 F.2d 698 (2nd Cir. 1987).

REASONS FOR GRANTING THE WRIT

I.
THE PETITION SHOULD BE GRANTED BECAUSE THE SIXTH CIRCUIT RESOLVED AN IMPORTANT LEGAL ISSUE IN A MANNER INCONSISTENT WITH THIS COURT'S DECISIONS, AND IN DIRECT CONFLICT WITH THE SECOND CIRCUIT

Petitioner's writ should be granted because the Sixth Circuit's decision abandons the policies articulated in American Pipe, *supra* and Crown Cork & Seal, *supra*, and would, if allowed to stand, require the very "needless multiplicity of suits" the rule announced there was designed to avoid. Further, its holding is in direct conflict with the rule of law announced in the Second Circuit.

American Pipe and Construction Co. v Utah, 414 U.S. 538 (1974), establishes the general rule that the filing of a class complaint tolls the statute of limitations for individual absent class members, both for claims alleged and claims not alleged growing out of the same conduct, transaction or occurrence. The Court explained the reason for this general rule:

. . . Whatever the merit in the conclusion that one seeking to join a class after the running of the statutory period asserts a 'separate cause of action' which must individually meet the timeliness requirements, . . . such a concept is simply inconsistent with Rule 23 as presently drafted. A federal class action is no longer 'an invitation to joinder' but a truly representative suit designed to avoid, rather than encourage, unnecessary filing of repetitious papers and motions. Under the circumstances of this case, where the District Court found that the named plaintiffs asserted claims that were 'typical of the claims or defenses of the class' and would 'fairly and adequately protect the interests of the class,' Rule 23(a)(3), (4), **the claimed members of the class stood as parties to the suit until and unless they received notice thereof and chose not to**

continue. Thus, the commencement of the action satisfied the purpose of the limitation provision as to all those who might subsequently participate in the suit as well as for the named plaintiffs. To hold to the contrary would frustrate the principal function of a class suit, because then the sole means by which members of the class could assure their participation in the judgment if notice of the class suit did not reach them until after the running of the limitation period would be to file earlier individual motions to join or intervene as parties - - **precisely the multiplicity of activity which Rule 23 was designed to avoid** in those cases where a class action is found "superior to other available methods for the fair and efficient adjudication of the controversy." Rule 23(b)(3).

* * *

> **Not until the existence and limits of the class have been established and notice of membership has been sent does a class member have any duty to take note of the suit or to exercise any responsibility with respect to it in order to profit from the eventual outcome of the case.**

414 U.S. at 550-51, emphasis supplied.

American Pipe dealt specifically with the issue of intervenors. Subsequently, in Crown Cork & Seal Co., Inc. v Parker, 462 U.S. 345, 103 S.Ct. 2392 (1983), the Supreme Court expanded upon American Pipe, holding that the filing of a class action tolled the statute for **all** putative class members, not just those who chose to intervene, and thus applied with equal force to a subsequent, separately-filed action. The Crown Cork court stated:

> [C]lass members who do not file suit while the class action is pending cannot be accused of sleeping on their rights.

Crown Cork, 462 US at 352. Thus, under Crown Cork, individual class members are permitted, indeed, encouraged, to rely on tolling rather than intervene in a class suit. This Court recognized this policy in Chardon v. Fumero Soto, 462 U.S. 650, 661, fn. 15 (1983).

Neither American Pipe nor Crown Cork dealt with a subsequent class action; both dealt with individual claims made after class certification was denied. Although both cases contain a concurring opinion which footnote a concern about "abuse" of the general rule (articulated by Judge Blackmun in American Pipe and Judge Powell in Crown Cork), even those concurring justices agreed that each individual putative class member's claim is tolled by the statute of limitations, despite the potential for abuse.

Moreover, the concurring opinions both specifically addressed the analysis that courts are to adopt when a second plaintiff raises claims that were not made in the initial suit:

> [W]hen a plaintiff invokes American Pipe in support of a separate lawsuit, the district court should take care to ensure that the suit raises claims that "concern the same evidence, memories, and witnesses as the subject matter of the original class suit," so that "the defendant will not be prejudiced." Claims as to which the defendant was not fairly placed on notice by the class suit are not protected under American Pipe and are barred by the statute of limitations.

Crown Cork and Seal, concurring opinion of Justice Powell, at 355, quoting American Pipe, concurring opinion of Justice Blackmun, at 562. Thus, even the cautionary note sounded by these concurring opinions acknowledge a test Weston can pass: her claim concerns the same subject matter, memories and evidence, and AmeriBank was placed on notice of

the subject matter of her claim and, indeed, the claim itself, in Dressel.[2]

Further, the Sixth Circuit's decision is irreconcilable with the Second Circuit's decision in Cullen v. Margiotta, 811 F.2d. 698 (2nd Cir. 1987), where it was held that a prior, unsuccessful state court action asserting no federal claims nonetheless tolled the statute of limitations for a subsequently-filed federal-court racketeering claim growing out of the same subject matter:

> [W]e do not regard the fact that the state court action was premised on different legal theories as a reason not to apply American Pipe tolling to save claims of class members who were not named plaintiffs in the state court action. It is not a flaw under that doctrine that the first action did not alert the defendant to have its lawyers research the

[2] Had the TILA amendment in Dressel been permitted, it would have related back to the original filing date pursuant to the Michigan equivalent of Fed. R. Civ. P. 15(c)(2), Michigan Court Rule 2.118(D).

> applicability of particular statute or rule of common law. **Indeed, limiting American Pipe tolling to the identical "causes of action" asserted in the initial class action would encourage and require class action members to file protective motions to intervene and assert their new legal theories prior to class certification, thereby producing the very results the New York courts seek to prevent by such tolling, i.e., "court congestion, wasted paperwork and expense."**

Cullen at 721. See also Paskuly v. Marshall Field, 494 F. Supp. 687 (N.D. Ill. 1980).

CONCLUSION

For years federal courts have recognized that the tolling rule announced in American Pipe is, in the words of Justice Blackmun, "a generous one, inviting abuse." It is nonetheless the rule, as Justice Blackmun's concurring opinion acknowledges. The Sixth Circuit has not followed it, and for this reason,

as well as the conflict between the Sixth and Second Circuits, the Court should grant certiorari.

Respectfully submitted,

DREW, COOPER & ANDING

By: John E. Anding

John E. Anding (P30356)
Christopher G. Hastings (P40861)
Business Address:
125 Ottawa Avenue, N.W.
Suite 300, Ledyard Building
Grand Rapids, Michigan 49503
Telephone: 616/454-8300

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RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

ELECTRONIC CITATION: 2001 FED App. 0310P (6th Cir.)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PATRICIA A. WESTON,
Plaintiff-Appellant,

CASE NO. 00-1115

v.

AMERIBANK,
Defendant-Appellee.

Appeal from the United States District Court for the Western District of Michigan at Grand Rapids.
No. 99-00698. Wendell A. Miles, District Judge.

Argued: January 30, 2001
Decided and Filed: September 7, 2001

BEFORE: **NORRIS, SILER,** AND **BRIGHT(*), CIRCUIT JUDGES.**

*The Honorable Myron H. Bright, Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

COUNSEL

ARGUED: John E. Anding, DREW, COOPER & ANDING, Grand Rapids, Michigan, for Appellant. Ronald J. VanderVeen, Holland, Michigan, for Appellee. **ON BRIEF:** John E. Anding, Christopher G. Hastings, DREW, COOPER & ANDING, Grand Rapids, Michigan, for Appellant. Ronald J. VanderVeen, Holland, Michigan, for Appellee.

OPINION

BRIGHT, Circuit Judge. Patricia A. Weston ("Weston") appeals the district court's[1] grant of summary judgment dismissing her Truth in Lending Act ("TILA") complaint. The district court determined that Weston's claim was barred by the TILA's one-year statute of limitations. 15 U.S.C. § 1640(e). For the reasons discussed below, we **AFFIRM**.

I. JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331. We have jurisdiction under 28 U.S.C. § 1291. Weston's notice of appeal was timely filed according to Fed. R. App. P. 4(a).

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[1]The Honorable Wendell A. Miles, United States District Judge for the Western District of Michigan.

II. BACKGROUND

On April 1, 1998 Weston closed a loan with AmeriBank. The bank charged Weston a $350 document preparation fee. Weston alleges that the $350 document preparation fee violates the TILA because it was not properly disclosed.

On December 21, 1998 Paul and Theresa Dressel ("Dressels"), acting on behalf of a class of similarly situated borrowers, filed a complaint in Michigan's Kent County Circuit Court alleging that AmeriBank violated Michigan law by charging them an inappropriate document preparation fee. The Dressels claimed, among other things, that AmeriBank violated Michigan usury law and Michigan's statutory prohibition against the unauthorized practice of law by charging them a $400 document preparation fee on their November 17, 1997 loan. On March 22, 1999 the state circuit court certified the Dressels' case as a class action. On July 2, 1999 the circuit court dismissed the case, holding that AmeriBank's document preparation fee did not violate Michigan's usury law and AmeriBank had not engaged in the unauthorized practice of law. The Dressels moved for reconsideration and sought leave to amend their complaint to include, among other things, a TILA claim. On September 3, 1999 the state circuit court denied their requests. The state circuit court held that the Dressels' TILA claim was barred by the

TILA's one-year statute of limitations because the Dressels' complaint was filed on December 21, 1998, more than thirteen months after their November 17, 1997 loan.

Weston filed her complaint on September 10, 1999, seven days after the state circuit court denied the Dressels' request for reconsideration and leave to amend their complaint and one year and seven months after closing her loan with AmeriBank. Weston is represented in this action by the same counsel who represented the Dressels. AmeriBank moved the district court to dismiss Weston's complaint, arguing that her TILA claim was barred by the one-year statute of limitations contained in 15 U.S.C. § 1640(e). The district court treated AmeriBank's motion as a motion for summary judgment and dismissed Weston's TILA claim because it was barred by the statute of limitations. The district court declined to exercise supplemental jurisdiction over Weston's state law claims, and dismissed them without prejudice.

III. DISCUSSION

We review the district court's grant of summary judgment *de novo*. *Birgel v. Board of Comm'rs*, 125 F.3d 948, 950 (6th Cir. 1997), *cert. denied*, 522 U.S. 1109 (1998). We view the evidence in the light most favorable to the nonmoving party to determine whether a genuine issue of material fact exists. *Adickes v. S.H Kress & Co.*,

398 U.S. 144, 157 (1970). Summary judgment is proper if the evidence "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

Title 15 U.S.C. § 1640(e) states that, "Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation ..." The parties do not dispute that the one-year statute of limitations applies to this case and that the statute of limitations bars Weston's complaint unless the statute of limitations is tolled. Rather, Weston argues that the statute of limitations on her TILA claim was tolled during the pendency of the *Dressel* class action and that once tolling applies, her complaint was filed within the applicable one-year period. The district court determined that Weston's TILA claim was not tolled and, therefore, that her claim was barred by the one-year statute of limitations.

In *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 552-53 (1974), the Supreme Court held that the commencement of a class action suit tolls the applicable statute of limitations for all class members who make timely motions to intervene upon denial of certification. The Court tolled the statute of limitations because class actions are designed to "avoid, rather than encourage, unnecessary

filing of repetitious papers and motions," 414 U.S. at 550, and because the "policies of ensuring essential fairness to defendants and of barring a plaintiff who has slept on his rights, are satisfied when, as here, a named plaintiff who is found to be representative of a class commences a suit and thereby notifies the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment." 414 U.S. at 554-55 (citations omitted).

In *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 350-52 (1983), the Court extended the tolling of the statute of limitations to those bringing individual actions after class certification is denied, and to those electing to opt out of the class action to file individual claims. In his concurrence, however, Justice Powell cautioned that, "[t]he tolling rule of *American Pipe* is a generous one, inviting abuse[,]" and it "should not be read . . . as leaving a plaintiff free to raise different or peripheral claims following denial of class status." 462 U.S. at 354 (Powell, J., concurring).

In this case, Weston's claim is barred by the TILA's one-year statute of limitations. Under *American Pipe*, the statute of limitations for putative class members of the original class is tolled only for substantive claims that were raised, or could have been raised, in the initial complaint. The Dressels' initial complaint alleged solely state law

violations. The state circuit court denied the Dressels' request to amend their complaint to assert a TILA claim because the applicable statute of limitations had run when the Dressels filed their initial complaint. Thus, the state law claims raised in *Dressel* are separate and distinct from Weston's TILA claims. The Dressel case did not toll the TILA's one-year statute of limitations for Weston's TILA claim because the Dressels did not assert a TILA claim and the Dressels could not have made a TILA claim in their initial complaint because their complaint was filed after the TILA's one-year statute of limitations had run. Therefore, the district court did not err when it granted summary judgment for AmeriBank.

IV. CONCLUSION

The district court did not err when it determined that the TILA's one-year statute of limitations barred Weston's claim and, therefore, we **AFFIRM** the district court's grant of summary judgment for AmeriBank.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PATRICIA A. WESTON,
on behalf of herself and all
others similarly situated,
Plaintiffs,

Case No. 1:99-CV-698

V.

AMERIBANK, a State Savings Bank,
Defendant.

OPINION AND ORDER ON DEFENDANT'S MOTION TO DISMISS BASED ON FAILURE TO STATE A CLAIM (STATUTE OF LIMITATIONS) AND LACK OF JURISDICTION

Plaintiff Patricia A. Weston filed this action, purported on behalf of herself and others similarly situated, alleging violation of the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 *et seq.*, by defendant AmeriBank ("AmeriBank" or "the bank"). Plaintiff has also asserted various related causes of action against AmeriBank under Michigan law. Weston, who borrowed money from AmeriBank for a real estate loan secured by a mortgage alleges that as part of the transaction the bank charged her a $350 fee disclosed as being for "document preparation," when in fact the fee

was for loan "processing" or "loan origination" and should have been disclosed as such.

AmeriBank, as it turns out, has already been sued, unsuccessfully, in a Michigan court, in a class action which arose from these same alleged disclosures/nondisclosures, albeit without the assertion of a claim under the TILA. This federal action is currently before the court on AmeriBank's "Motion to Dismiss Based on Failure to State a Claim (Statute of Limitations) and Lack of Jurisdiction" (docket no. 3). Plaintiff has opposed the motion, which has been exhaustively briefed by the parties, each making their own submissions outside the pleadings.

For the reasons to follow, the court grants the motion and dismisses this action with prejudice.

FACTS

The following is Ms. Weston's version of the facts, as stated in her Brief in Opposition to AmeriBank's motion. For purposes of deciding this motion, the court assumes these facts to be true.

Ms. Weston closed a loan with AmeriBank on April 1, 1998. She was charged a "document preparation" fee of $350, which was disclosed on Line 1105 of her HUD-1

Settlement Statement.[1] This $350 "document preparation" fee was not, however, disclosed on Weston's Truth in Lending disclosure as an element of the "finance charge," and was not included in the annual percentage rate disclosed to Ms. Weston. According to Weston, the $350 charge vastly exceeds the cost of preparing closing documents.

Less than nine months after AmeriBank closed Weston's loan, the bank was sued in Michigan's Kent County Circuit Court. Paul and Theresa Dressel, acting on behalf of a class of similarly situated borrowers, filed a complaint alleging that AmeriBank had violated Michigan law by charging the document preparation fee. Among the Dressel's allegations was the specific allegation that AmeriBank had violated Michigan law by charging a "document preparation" fee that exceeded its actual costs in preparing closing documents. *See Dressel v. AmeriBank*, No. 98-13017-CP (Kent County Circuit Court, Complaint dated December 21, 1998).

On March 22, 1999, the Circuit Judge assigned to the case certified *Dressel* as a class action.[2] According to

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[1]A copy of this document has been submitted as an exhibit to Ameribank's Reply Brief.

[2]*See* Order attached as Exhibit 1 to Plaintiff's Surreply Brief.

plaintiff Weston here, however, before the class notice was sent, the Circuit Judge dismissed the Dressel case. According to the judge's ruling,[3]

> [AmeriBank's] practice of preparing documents and charging a fee for that preparation does not constitute the unauthorized practice of law; it is neither the practice of law, nor is it unauthorized if it is the practice of law. This Court also concludes that, likewise as a matter of law, the fee charged by the bank is not illegal, even if it exceeds the costs of preparing the loan documents. Accordingly, since all of plaintiffs' various theories of recovery are predicated on the contentions that the bank is engaged in the unauthorized practice of law and/or is charging an illegal fee, the entire case must be dismissed....

The *Dressel* case was dismissed by an order entered on July 2, 1999.[4] Subsequently, the plaintiffs in that case sought reconsideration of the dismissal, and also sought leave to amend their complaint to assert additional theories of recovery, including a federal claim of violation of the

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[3]A copy of the circuit judge's Opinion in *Dressel* is attached as Exhibit C to Ameribank's motion.

[4]*See* Exhibit D to AmeriBank's motion.

TILA. By order entered on September 3, 1999, the circuit judge denied their requests.[5] According to plaintiff, the *Dressel* plaintiffs have appealed the circuit judge's decision. Brief in Opposition at 5, n.3.

Plaintiff Weston filed this actin on September 10, 1999, seven days after the state circuit judge denied the *Dressel* plaintiffs' motion for reconsideration in that case, and approximately one year and five months after closing her loan with AmeriBank. Ms. Weston is represented in this action by the same counsel which represented the plaintiffs in *Dressel*.

ANALYSIS

In its motion, AmeriBank argues that plaintiffs TILA claim is barred by the one-year statute of limitations contained in 15 U.S.C. § 1640(c).

In evaluating the sufficiency of a complaint under Rule 12(b)(6), the court must construe as well-pleaded factual allegations favorably to the plaintiff *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in

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[5]*See* Exhibit F to AmeriBank's motion.

support of his claim which would entitle him to relief *Id.* (citing *Conley v. Gibson*, 355 U.S. 41, 45- 46 (1957)). If, on a motion under Rule 12(b)(6), matters outside the pleadings are presented and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56.

Under Rule 56(c), summary judgment is proper where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The party moving for summary judgment bears the burden of establishing the non-existence of any genuine issue of material fact and may satisfy this burden by showing--that is, pointing out to the district court--that there is an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). While inferences drawn from the underlying facts must be viewed in the light most favorable to the non-moving party, when the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The substantive law identifies which facts are material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Here, both sides have presented materials outside the pleadings which the court has not excluded. Therefore, the court is required to treat the motion as one for summary judgment under Rule 56. Although Rule 12(b) provides that in such instances the parties "shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56[,]" because the parties have had more that a reasonable opportunity to present material (having submitted written materials exceeding those typically allowed by the district's rules), the court concludes that the motion is ripe for decision.

Title 15 U.S.C. § 1640(e) provides, in pertinent part, as follows:

> Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation....

Plaintiff does not dispute that the applicable limitations period is one year. However, she argues that the statute was tolled on her TILA claim during the pendency of the *Dressel* class action and that once tolling is applied, her complaint in this action was filed well within the applicable one-year period.

In support of her position, plaintiff states that "federal law recognized[s] that the filing of a class complaint tolls the statute of limitations for absent class members, both for claims actually alleged and those growing out of the same conduct, transaction, or occurrence." In general, this statement is true; however, whether the reasoning behind it permits the extension of tolling to the plaintiffs claims in this action is by no means certain.

In *American Pipe and Construction Co. v. Utah*, 414 U.S. 538 (1974), the Supreme Court explained the reason for this general rule:

> ... Whatever the merit in the conclusion that one seeking to join a class after the running of the statutory period asserts a 'separate cause of action' which must individually meet the timeliness requirements, ...such a concept is simply inconsistent with Rule 23 as presently drafted. A federal class action is no longer 'an invitation to joinder' but a truly representative suit designed to avoid, rather that encourage, unnecessary filing of repetitious papers and motions. Under the circumstances of this case, where the District Court found that the named plaintiffs asserted claims that were 'typical of the claims or defenses of the class' and could 'fairly and adequately protect the interest of the class,' Rule 23(a)(3), (4), the claimed members of the class

> stood as parties to the suit until and unless they received notice thereof and chose not to continue. Thus, the commencement of the action satisfied the purpose of the limitation provision as to all those who might subsequently participate in the suit as well as for the named plaintiffs. To hold to the contrary would frustrate the principal function of a class suit, because then the sole means by which members of the class could assure their participation in the judgment if notice of the class suit did not reach them until after the running of the limitations period would be to file earlier individual motions to join or intervene as parties--precisely the multiplicity of activity which rule 23 was designed to avoid in those cases where a class action is found 'superior to other available methods for the fair and efficient adjudication of the controversy.' Rule 23(b)(3).

414 U.S. at 550-551.

In *American Pipe*, however, the district court has ordered that the suit could not continue as a class action. *Id.* at 552. Therefore, the Court held that

> in this posture, at least where class action status has been denied solely because of failure to demonstrate that 'the class is so numerous that joinder of all members is impracticable,' the commencement of

> the original class suit tolls the running of the statute for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status. As the Court of Appeals was careful to note in the present case, '[m]aintenance of the class action was denied not for failure of the complaint to state a claim on behalf of the members of the class (the court recognized the probability of common issues of law and fact respecting the underlying conspiracy), not for lack of standing of the representative, or for reasons of bad faith or frivolity.'

Id. at 552-553 (citation omitted).

As one member of the Court later observed in *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 354 (1983), "[t]he tolling rule of *American Pipe* is a generous one, inviting abuse[,]" which "should not be read ... as leaving a plaintiff free to raise different or peripheral claims following denial of class status." (Powell, J., concurring). The Court in the case held that

> Once the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied. At that point, class members may choose to file their own suits or to intervene as plaintiffs in the pending action.

Id. at 354.

Plaintiff Weston is not however, in this case, merely attempting to bring her own individual claims against AmeriBank. Instead, Weston, like her predecessors in *Dressel*, seeks classwide relief As the Court of Appeals to which this district court must answer has clearly held, in such cases although the limitations period for filing individual claims is tolled during the pendency of the earlier class action, ***"there is no tolling for future class actions by putative class members."*** *Andrews v. Orr*, 851 F.2d 146, 149 (6th Cir. 1988). As the panel observed in *Andrews*:

> The courts of appeals that have dealt with the issue appear to be in unanimous agreement that the pendency of a previously filed class action does not toll the limitations period for additional class actions by putative members of the original asserted class. *See Korwek v. Hunt*, 827 F.2d 874, 879 (2d Cir. 1987) ('The Supreme Court ... certainly did not intent to afford plaintiffs the opportunity to argue and reargue the question of class certification by filing new but repetitive complaints.'); *Salazar-Calderon v. Presidio* Valley Farmers Ass'n, 765 F.2d 1334, 1351 (5th Cir. 1985), cert. denied, 475 U.S. 1035, 106 S.Ct. 1245, 89 L.Ed.2d 353 (1986) ('Plaintiffs have no authority for their contention that putative class members may piggyback one class action onto another and thus toll the statute of limitations indefinitely...'); *Robbin v. Fluor Corp.*,

> 835 F.2d 213, 214 (9th Cir. 1987) (adopting reasoning of *Korwek*). These decisions reflect the concern expressed by Justice Powell, concurring separately in *Crown, Cork & Seal*: 'The tolling rule of *American Pipe & Constr. Co.v. Utah*, 414 U.S. 538, 94 S.Ct. 756,38 L.Ed.2d 713 (1974)] is a generous one, inviting abuse.' 462 U.S. at 354, 103 S.Ct. at 2398.

851 F.2d at 149; *accord, Basch v. Ground, Inc.*, 139 F.3d 6, 11 (1st Cir. 1998) ("Plaintiffs may not stack one class action on top of another and continue to toll the statute of limitations indefinitely. Permitting such tactics would allow lawyers to file successive putative class actions with the hope of attracting more potential plaintiffs and perpetually tolling the statute of limitations as to all such potential litigants, regardless of how may times a court declines to certify the class"); *Griffin v. Singletary*, 17 F.3d 356, 359 (11th Cir. 1994) (acknowledging "the wisdom of the rule against piggybacked class actions"). More recently, the ninth Circuit has also recently held that tolling does not apply to successor class actions even where the original class was certified. *Catholic Social Serv., Inc. v Immigration and Naturalization Serv.*, 182 F.3d 1053, 1059 (9th Cir. 1999). Therefore, this action filed by Weston could not, under any circumstances, proceed as a class action. But can it proceed at all, even as an individual claim?

Had plaintiff Weston filed this action in a Michigan state court, little doubt exists that her TILA claim would be subject to dismissal. In *Lee v. Grand Rapids Bd. of Educ.*, 148 Mich. App. 364, 384 N.W.2d 165, 168 (1986), Michigan's court of appeals held that federal claims which a United States District Court had refused to certify in a previous class action were time-barred. In that case, the plaintiffs had been members of a class in the prior federal action alleging claims including violations of 42 U.S.C. § 1983, Title VII of the Civil Rights Act of 1964, and the Fourteenth Amendment. The federal court certified the case as a class action, but only as to the claims under Title VII. Ultimately, the federal appeals court reversed the class certification and remanded the case to the district court, which issued an order providing for notice of decertification. At about this same time, the plaintiffs in *Lee* filed there state court action, asserting claims under 42 U.S.C. § 1983, the Fourteenth Amendment, and state law. The Michigan Court of Appeals concluded that the plaintiffs' state law claims, which had been included in an amended complaint filed in the class action, were not time-barred because the filing of the federal lawsuit had tolled the operation of the statute of limitations on those claims. However, the court also concluded that the plaintiffs' claims under the Fourteenth Amendment and § 1983 were time-barred because the federal district court's refusal to certify these claims as class claims--a decision made in excess of six years before the individual plaintiffs filed there

action--caused the three-year statute of limitation to begin to run. 384 N.W.2d at 166-68.

Here, plaintiff Weston's TILA claim was not asserted in the prior class action. It was not included in the *Dressel* class action complaint, and, although the plaintiffs sought to assert claims under TILA after the circuit judge dismissed the action on the merits, the circuit judge denied them leave to amend to assert the claims.

Title 28 U.S.C. § 1738 requires that federal courts give state court decisions the same full faith and credit that they would receive "in the courts of such State." Thus, a prior state court adjudication has the same effect in federal court as it would in state court. *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 379 (1985). "There is of course no dispute that under elementary principles of prior adjudication a judgment in a properly entertained class action is binding on class members in any subsequent litigation." *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 874 (1984). Moreover, "a judgment entered in a class action, like any other judgment entered in a state judicial proceeding, is presumptively entitled to full faith and credit" under § 1738. *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 374 (1996).

Under Michigan law, *res judicata*, or claim preclusion, prevents a plaintiff from litigating a claim that actually was litigated or could have been litigated in an earlier proceeding. *Brownridge v. Michigan Mutual Ins. Co.*, 115 Mich. App. 745, 321 N.W.2d 798, 799 (1982); *see also City Communications, Inc. v. City of Detroit*, 888 F.2d 1081, 1089 (6th Cir. 1989). ("Since 1980, Michigan courts have followed a broad application of *res judicata*, using it to bar *both* claims actually litigated by parties in prior actions *and claims that could have been, but were not, litigated*") (citations omitted). Under the doctrine, a subsequent legal action is barred if (1) the parties or their privies are the same; (2) the prior judgment was rendered by a court of competent jurisdiction; (3) the prior judgment was a final judgment on the merits; and (4) the two suits involve the same cause or causes of action that were brought, or could have been brought, in the prior litigation. *Smith, Hinchman & Giylls, Assocs., Inc. v. Tassic*, 990 F.2d 256, 257-58 (6th Cir. 1993). A "party" in this connection is one who is "directly interested in the subject matter and had a right to make defense, or to control the proceedings, and to appeal from the judgment." *Id.*, 459 N.W.2d at 65 (citing *Howell v. Vito's Trucking and Excavating Co.*, 386 Mich. 37, 191 N.W.2d 313 (1971)).

Each of the elements of claim preclusion is present here. Even though she was not a named plaintiff in the prior action, Weston clearly had a direct interest in the

subject matter of the action, being a member of the class on behalf of which relief was sought. (Indeed, Weston's membership in the *Dressel* class forms the basis of her argument that the limitations period was tolled.) In addition, there is no doubt that the circuit court was a court of competent jurisdiction for the claims which were or could have been asserted in that action, including the TILA claims. Thirdly, the circuit court entered a final decision on the merits. *See, e.g., Carter v. Southeastern Michigan Transp. Auth.*, 135 Mich. App. 261, 351 N.W.2d 920, 922 (1984) (involuntary dismissal was an adjudication on the merits); *Brownridge*, 321 N.W.2d at 799 (voluntary dismissal with prejudice is a final judgment on the merits for res judicata purposes).[6] Finally, as the circuit judge noted in denying the *Dressel* plaintiffs' motion for leave to amend, the TILA claims could have been brought in that action, had they been asserted on a timely basis.[7]

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[6]Although Weston contends that the *Dressel* plaintiffs filed an appeal, "Michigan and federal courts agree that an appeal of a judgment does not alter the preclusive effect of the same." *Chakan v. City of Detroit (Detroit Fire Dep't)*, 998 F. Supp. 779, 783 (E.D. Mich. 1998) (citation omitted).

[7]It is also noted that under Michigan's court rules, "[a] judgment entered in an action certified as a class action binds all members of the class who have not submitted an election to be excluded, except as otherwise directed by the

Plaintiff has vehemently denied AmeriBank's allegation that she has "forum shopped." The fact that she filed this action a mere seven days after the circuit judge denied the Dressels' motion for reconsideration, and without filing her own appeal or even her own state court action, however, strongly supports AmeriBank's allegation of forum shopping. The strong aroma of forum shopping has caused this court to reject application of a case on which plaintiff heavily relies, *Cullen v. Margiotta*, 811 F.2d 698 (2d Cir. 1987). *See Wade v. Danek Medical, Inc.*, 182 F.3d 281, 287-88 (4th Cir. 1999) (in diversity action, panel concluded that Virginia Supreme Court would not adopt a cross-jurisdictional tolling rule, because, among other reasons, "if Virginia were to adopt a cross-jurisdictional tolling rule, [it] would be faced with a flood of subsequent filings once a class action in another forum is dismissed, as

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court." M.C.R. 3.501(D)(5).

M.C.R. 3.501(E) provides that an action certified as a class action "may not be dismissed ... without the approval of the court, and notice of the proposed dismissal . . . shall be given to the class in such manner as the court directs." In this instance, the plaintiffs in *Dressel* had the same counsel as does Weston in this case. Under the circumstances, assuming that the issue of notice is relevant in some cases, the court would conclude that Weston had constructive notice of the proposed dismissal.

forum-shopping plaintiffs from across the country rush into the Virginia courts to take advantage of its cross-jurisdictional tolling rule"). Moreover, unlike *Cullen's* interpretation of New York law, Michigan courts do not allow tolling where the new case involves different legal theories that those pled in the first case. Given the holding in *Andrews v. Orr*, the court also believes it unlikely that the Sixth Circuit would follow *Cullen*, a decision which is of questionable authority even in the Second Circuit where it was decided.

Plaintiff, in summary, must take the bitter with the sweet. If she is to rely on the filing of a prior state court action to toll the limitations period for her own individual action, equitable considerations require that she be bound, if not by the substantive rulings made in the prior action, then at least to the scope of the prior litigation, including the legal theories asserted by her own counsel, who presented himself in that action as being a suitable representative of all putative class members.

EQUITABLE ESTOPPEL

As noted above, plaintiffs response to AmeriBank's argument that her TILA claim is time-barred (or, at least, her response as originally briefed) consists of her contention that the pendency of the *Dressel* suit tolled the statute of limitations on her claim. Brief in Opposition at 5. However, in her "Surreply" brief, plaintiff Weston has for the first time argued that the limitations period should be equitably tolled for another reason. Why should it be so tolled, says Weston? Because AmeriBank engaged in fraudulent concealment, Weston contends. More specifically, she argues that because AmeriBank did not disclose its "document preparation" fee as a "finance charge," and because during depositions the bank's representatives "lied" by stating otherwise, the limitations period should be equitably tolled.

Equitable tolling "is the doctrine under which plaintiffs may sue after the statutory time period has expired if they have been prevented from doing so due to inequitable circumstances." *Ellis v. General Motors Acceptance Corp.*, 160 F.3d 703, 706 (11th Cir. 1998) (citations omitted). Courts have held that the limitations period contained in 15 U.S.C. § 1640(e) is subject to equitable tolling in "appropriate circumstances." *Jones v. TransOhio Savings Ass'n*, 747 F.2d 1037, 1043 (6th cir. 1984); accord *Ellis*, 160 F.3d at 708. However, such circumstances are not, as matter of law, present here.

On its face, Weston's complaint alleges that AmeriBank charged her "a fee disclosed on the HUD-1 Settlement Statement purportedly for the service of "Document preparation[.]" Complaint, ¶ 1. Weston's complaint therefore alleges not that AmeriBank failed to disclose that it was charging the fee, but rather that AmeriBank somehow "misled" her and other customers by failing to included the fee in the "Finance Charge" and the "Annual Percentage Rate" of the TILA disclosure. *Id.* at 5, ¶ 16. Thus, according to Weston, AmeriBank failed to disclose that is was charging the fee as **a finance charge**, concealing the true **nature** of the charge if not the fact of the charge itself.

The court concludes, as a matter of law, that AmeriBank's actions do not amount to fraudulent concealment which would merit the application of equitable tolling. Nothing which AmeriBank has done, or failed to do, prevented Weston from filing suit in a timely manner. AmeriBank did not hide the fact of the charge, nor did it conceal to whom the fee would be paid. Given these undisputed facts, the court concludes that the circumstances present fail to justify equitable tolling.[8]

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[8]As the circuit judge noted in denying the plaintiffs' motion for leave to amend in the *Dressel* case, the plaintiffs--who were represented by the same counsel representing Weston here--had information sufficient to

CONCLUSIONS

For the foregoing reasons, and because the court concludes that Weston's TILA claim is time-barred, the court grants AmeriBank's motion and dismisses Weston's claim under the TILA with prejudice.

Title 28 U.S.C. § 1367(c)(3) provides that the district court may decline to exercise supplemental jurisdiction where all claims over which the court had original jurisdiction are dismissed. This action is still in its early stages, and therefore the court concludes that dismissal of the non-federal claims is appropriate. In conclusion, the court declines to exercise its supplemental jurisdiction here, and also dismisses plaintiff's state law claims without prejudice.

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enable them to assert the purported TILA violations against AmeriBank by not later than March 2, 1999. Defendant's Exhibit E at 8-10. In spite of possessing such knowledge, the Dressels did not even seek leave to file an amended pleading asserting a TILA claim until after the circuit judge granted AmeriBank' s motion to dismiss the. action in July, 1999.

So ordered this 30th day of December, 1999.

/s/ Wendell A. Miles
Wendell A. Miles, Senior Judge

STATE OF MICHIGAN
COURT OF APPEALS

PAUL DRESSEL and THERESA DRESSEL,
Plaintiffs-Appellants,

v.

AMERIBANK,
Defendant-Appellee.

FOR PUBLICATION
August 3, 2001
9:05 a.m.

No. 222447
Kent Circuit Court
LC No. 98-013017-CP

Before: Whitbeck, P.J., and Smolenski and Cooper, JJ.

COOPER, J.

Plaintiffs appeal as of right from the trial court's June 12, 1999, opinion that granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). **We reverse.**

On November 7, 1997, plaintiffs obtained a real estate loan from defendant that was secured by a mortgage on their home. In connection with the loan, defendant prepared an adjustable rate note and a mortgage for plaintiffs. The settlement statement designated a $400 fee for "document preparation." According to the documentation defendant provided plaintiffs, the document preparation fee was described as "a separate fee that some lenders or title companies charge to cover their costs of preparation of final legal papers, such as a mortgage, deed of trust, note or deed." United States Dep't of Housing & Urban Development, *Buying Your Own Home* (Washington, DC: United States Gov't Printing Office, 1997), p 24.

In December 1998, plaintiffs filed suit, arguing that the charge for completing mortgage documents constituted the unauthorized practice of law by defendant; was illegal under the laws regulating banks in this state; violated the Michigan Consumer Protection Act (MCPA), MCL 445.90 1 *et seq.*; and ignored the common law of the state of Michigan. This case was certified as a class action March 22, 1999, to provide potential relief for any borrowers who had also been charged the "document preparation" fee. Plaintiffs filed a motion for partial summary disposition on March 26, 1999. On April 5, 1999, defendant moved for summary disposition pursuant to MCR 2.116(C)(8) and (10). The trial court granted defendant's

motion for summary disposition on the basis of MCR 2.116(C)(10). Plaintiffs now appeal the trial court's decision.

This Court reviews a grant or denial of summary disposition *de novo*. *Spiek v. Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Summary disposition of a claim may be granted when, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10); *see also Smith v. Globe Life Ins. Co.*, 460 Mich 446, 454-455; 597 NW2d 28 (1999).

Plaintiffs contend the "document preparation" fee is, under these circumstances, the unauthorized practice of law. We agree.

Michigan law prohibits the unauthorized practice of law by individuals. MCL 600.916. Moreover, MCL 450.681 specifically enjoins corporations from practicing law without a license. That statute, in pertinent part, provides that:

> [i]t shall be unlawful for any corporation or voluntary association to practice or appear as an attorney-at-law for any person other than itself in any court in this state or before any judicial body, or to make it a business to practice as an attorney

-at-law, for any person other than itself . . .

* * *

> This section shall not apply to any corporation or voluntary association lawfully engaged in a business authorized by the provisions of any existing statute, nor to a corporation or voluntary association lawfully engaged 'in the examination and insuring of titles of real property, nor shall it prohibit a corporation or voluntary association from employing an attorney or attorneys in and about its own immediate affairs or in any litigation to which it is or may be a party .... But no corporation shall be permitted to render any services which cannot lawfully be rendered by a person not admitted to practice law in this state nor to solicit directly or indirectly professional employment for a lawyer. [MCL 450.681.]

However, these statutes fail to define precisely what constitutes the "practice of law." Rather, such determinations have been left to the discretion of the courts. *State Bar of Michigan v. Cramer*, 399 Mich 116, 132; 249 NW2d 1 (1976). The courts must weigh all the factors, keeping in mind the purpose of the prohibition, which is to protect the public from untrained legal counsel and incorrect legal advice. *Id.* at 133-134.

Several Michigan cases have endeavored to provide relevant criteria to determine what activities amount to the practice of law. For example, the Court, in *Grand Rapids Bar Ass'n v. Denkema*, 290 Mich 56; 287 NW 377 (1939), concluded that charging a fee for the preparation of legal instruments for others constitutes the practice of law. In that case, the defendant, who was not an attorney, was engaged in the business of insurance and real estate loans and had, among other things, drawn mortgages and wills for others. *Id.* at 59-60. The trial court enjoined defendant's activities and he appealed the portion of the injunction which prevented him from taking notes concerning wills and then transmitting that information to the attorney. *Id.* at 64.

Our Supreme Court examined numerous cases from other jurisdictions and noted that:

> [t]he preparation of conveyances of real estate and personal property by the defendant for others, for a consideration, comes within the usual and ordinary definition of "practice of law." The preparation of legal papers in connection with his business as a loan broker has been held to be the practice of law. [*Id.* at 66 (citing *Ferris v. Snively*, 172 Wash 167; 19 P2d 942 (1933); *State ex rel Wright v. Barlow*, 131 Neb 294; 268 NW 95 (1936).]

The Court also agreed with the proposition that the preparation of legal documents, when done as a business, constitutes the practice of law. *Denkema, supra* at 66-67, citing *People v. Alfani*, 227 NY 334; 125 NE 671 (1919); *Paul v. Stanley*, 168 Wash 371; 12 P2d 401 (1932).

The Court in *Denkema* further discussed whether the preparation of documents, without providing counsel or advice as to the effects of those documents, is considered the practice of law.

> We do not desire to be understood as saying that the mere act of drawing a promissory note, chattel mortgage, real estate mortgage, deed or other similar instruments would constitute the practice of law, where the person so drawing them acts merely as an amanuensis and does not advise or counsel as to the legal effect and validity of such instruments. [*Denkema, supra* at 67, quoting Barlow, *supra* at 96.]

Ultimately, the Court concluded that "[t]he activities of the defendant in connection with the probate of estates in which he was not personally interested come within the prohibition of the Michigan statute." *Denkema, supra* at 69. Thus, *Denkema* provides that the preparation of legal documents constitutes the practice of law when it is done as a business, by an uninterested party, and when advice or counsel is given concerning the effect of those documents.

About fifteen years later, in *Ingham County Bar Ass'n v. Walter Neller Co.*, 342 Mich 214; 69 NW2d 713 (1955), the Supreme Court revisited the question of what constitutes the practice of law. In that case, the defendants, who were not attorneys but licensed real estate brokers, had filled in printed forms of various legal significance that were incidental to the real estate transactions in which they were engaged. *Id.* at 217. However, the defendants did not charge any extra fees for these services. *Id.*

The *Walter Neller* Court compared the facts in *Denkema, supra*, and the facts of the case before it, stating that:

> [t]he difference between the *Denkema* case and the one at bar is that in the former the defendant appeared to be in the business of executing these instruments *rather than doing so without extra compensation* and as incidental to another lawful business--the situation at bar. [*Id.* at 222 (emphasis added).]

The Court held that "[t]here cannot be any objection to a licensed broker doing such work [filling in standardized forms of agreements of purchase and sale, land contracts, deeds, and mortgages] *without compensation* when it is incidental to his business." *Id.* at 229 (emphasis added).

The *Walter Neller* decision was upheld in *State Bar of Michigan v. Kupris*, 366 Mich 688; 116 NW2d 341(1962). In *Kupris*, the defendant realtor charged a separate fee for the preparation of legal documents in a transaction in which he was not involved. *Id.* at 690. The trial court enjoined defendant from performing legal services and giving legal advice but allowed him to continue filling out standard printed forms that were incidental to his business, provided that no extra charge was made. *Id* at 691-692. On appeal, the Court reaffirmed the *Walter Neller* decision and upheld the trial court's injunction. Thus, *Kupris* implied that the trial court's injunction was consistent with the holding of *Walter Neller. Id.* at 696.

Despite the numerous cases pertaining to real estate brokers, Michigan case law has yet to declare specifically that charging a separate fee for the preparation of legal documents by a banking institution constitutes the unauthorized practice of law. However, such a conclusion is supported by a significant body of case law in other jurisdictions. After examining other states that have decided this issue, we find that the majority have concluded that filling in legal documents incidental to one's business, for a fee, constitutes the unauthorized practice of law.[1] In fact, the

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[1]*See* Comment, *Too many hands in the cookie jar: the unauthorized practice of law by real estate brokers*, 75 Or L R 889, 900 (1996); *see also In re First Escrow, Inc.*, 840 SW2d 839 (Mo, 1992); *Pulse v. North American*

Indiana Supreme Court has specifically confronted the question of whether lay bank employees may fill in blanks on standardized forms. *Miller v. Vance*, 463 NE2d 250, 253 (Ind, 1984). The Indiana Court concluded that they may do so only as long as: the mortgage form had been approved by an attorney; the bank and the bank's client were involved in the transaction requiring the mortgage; the bank employee did not give advice concerning the legal effects of the document; and the bank did not make a separate charge for the preparation of the document. *Id.* Likewise, in *Cain v. Merchants Nat'l Bank & Trust Co.* of Fargo, 6 ND 746; 268 NW 719 (1936), the Supreme Court of North Dakota allowed a defendant to continue preparing documents that. were incidental to its business provided that no separate fee was charged.

There are some states that have taken the opposite position and do not agree that compensation for legal services, performed by a non-attorney, can transform those

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Land Title Co. of Montana, 218 Mont 275; 707 P2d 1105 (1985); *Miller v. Vance*, 463 NE2d 250 (md, 1984); *Pope Co. Bar Ass'n, Inc. v. Suggs*, 774 Ark 250; 624 SW2d 828 (1981); *In re Flint*, 10 Vt 471; 8 A2d 655 (1937); *Cain v. Merchants Nat'l Bank & Trust Co. of Fargo*, 6 ND 746; 268 NW 719 (1936); *Childs v. Sineltzer*, 315 Pa 9; 171 A 883 (1934); *State v. Bryan*, 98 NC 644; 4 SE 522 (1887); Tex Gov't Code Ann 83.00 1(a); Va UPL Op No. 94.

services into the unauthorized practice of law. *See Perkins v. CTX Mortgage Co.*, 137 Was 2d 93; 969 P2d 93 (1999). However, the states that follow this view have also recognized that the existence of a fee is not completely irrelevant. For instance, the Minnesota Supreme Court noted that while a charge alone may not be determinative of whether an action constitutes the unauthorized practice of law, it does reflect the parties' value of the services. *Cardinal v. Merrill Lynch Really/Burnet, Inc.*, 433 NW2d 864, 869 (Minn. 1988).

> If a charge is made for the services, it is likely that both the actor and the recipient, as reasonably intelligent non-lawyers who are reasonably familiar with similar transactions, understand the legal question to be difficult or doubtful. An uncompensated service is much more likely to involve only uncomplicated questions. Hence, whether the service was performed for or without a fee is relevant to and a factor in, even though not determinative of, the decision whether the service constituted the unauthorized practice of law. *[Id]*

Thus, even under the Minnesota analysis, if the existence of a fee was not determinative it would still be an important factor.

This Court agrees with the majority opinion of the states that charging a fee can take an otherwise incidental

act into the realm of the unauthorized practice of law. We agree that drafting mortgage documents was incidental to defendant's business; however, the key issue is the fact that a fee was charged for those services. As indicated above, several Michigan cases dealing with realtors have highlighted the fact that when a separate fee is charged, certain acts become the unauthorized practice of law. See *Kupris, sura* at 696; *Walter Neller, supra* at 229. It is particularly notable that the Court in *Walter Neller* specifically included the provision "without compensation" in it conclusion that brokers who fill in documents incidental to their business are not practicing law. *Walter Neller, supra* a 229.

In *Bay County Bar Ass'n v. Finance System, Inc.*, 345 Mich 434; 76 NW2d 23 (1956), our Supreme Court declared the practices of two claim agencies to be the unauthorized practice of law. In that case, the agencies took assignments of claims from creditors. *Id.* at 436. After efforts to collect on the claims were exhausted, the agencies would bring suit on the claims, often without the assistance of an attorney, and collect a portion of the outcome. *Id.* The Supreme Court stated that:

> [w]here the collection practice involves the preparing of legal papers, furnishing legal advice and other legal services, the compensation allowed must be assumed to be in part allowed to pay for the legal services so rendered. No matter how one looks

> be assumed to be in part allowed to pay for the legal services so rendered. No matter how one looks at it, this constitutes the render of legal services for others as a regular part of business carried on for financial gain. [*Id.* at 442].

Thus, the Court clearly considered the compensation to be demonstrative of the collection agencies' involvement in the unauthorized practice of law.

Furthermore, despite defendant's arguments to the contrary, we find no applicable exceptions to justify defendant's actions. Defendant claims that is was acting on it own behalf when it prepared plaintiffs' mortgage and that the "pro se exception," in MCL 450-681 and MCL 600. 916, allows individuals and companies to prepare legal documents for themselves. Thus, defendant opines that its actions were not the unauthorized practice of law because it was an interested party to the transaction. However, we believe that the separate fee for the preparation of mortgage documents by a bank crosses the threshold of providing services for the bank's own benefit and engaging in a business where a profit is made from manufacturing legal documents without the requirement of licensure from the state bar. If the preparation of the mortgage documents for defendant's customers was not a service, but rather incidental to its business as defendant claims, then there would be no basis for the separate charge to defendant's

a fee is charged, is not the unauthorized practice of law.

Defendant's claim that it is authorized under the Savings Bank Act, MCL 487.3101, *et seq.*, to charge a fee for the preparation of legal documents, is also unfounded. The Savings Bank Act provides for the incorporation of savings banks within this state. This act grants a savings bank, incorporated under the statute, the power to "engage in the business of banking and exercise all powers incidental to the business of banking or which further or facilitate the purposes of a savings bank." MCL 487. 3401(1). The Savings Bank Act further allows a bank to "collect interest and charges on loans ... as permitted by the credit reform act." MCL 487.3430(1)(a).

The Credit Reform Act, MCL 445.1851 *et seq.*, allows a bank to "charge ... a borrower ... all fees and charges that are agreed to or accepted by the borrower ..." MCL 445. 1857(1). This grant of authority to charge fees is limited, however, to fees that are not excessive. MCL 445.1857(3). An excessive fee is defined by the act to be a fee that "exceeds the amount allowed in section 6(1), (2), or (3), section 7, or any other applicable law or statute of this state." MCL 445.1852(f). Charging a fee for the preparation of legal documents constitutes the unauthorized practice of law under MCL 450.681. Thus,the grant of authority in the Credit Reform Act to charge non-excessive fees does not authorize a document preparation fee for legal documents

because such fees would be in violation of MCL 450.681. Therefore, defendant was not authorized by law to charge a document preparation fee for plaintiffs' mortgage.

Defendant further raises the argument that car dealers are statutorily permitted to charge fees for contract preparation under the Motor Vehicle Sales Finance Act, MCL 492.101 *et seq*. However, a review of that act shows that is does not specifically authorize a fee for legal documents. MCL 492.117; MCL 492.131.

Plaintiffs also included, in their complaint, causes of action under the Michigan Consumer Protection Act ("MCPA"), MCL 445.901 *et seq*. The trial court's opinion reasoned that, because the remainder of plaintiffs' claims were erroneously premised on the theory that either defendant had engaged in the unauthorized practice of law or had illegally charged plaintiffs a fee, plaintiffs could not prevail on any of their theories of relief Plaintiffs now argue that, because the trial court's underlying assumptions on the unauthorized practice of law and fee issues were erroneous, the trial court erred in dismissing their MCPA claims. We agree.

"The MCPA is a remedial statute designed to prohibit unfair practices in trade or commerce and must be liberally construed to achieve its intended goals." *Forton v. Laszar*, 239 Mich App 711, 715; 609 NW2d 850 (2000).

Our Supreme Court, in *Smith, supra*, considered the applicability of the MCPA to a "transaction or conduct specifically authorized under laws *administered by a regulatory board or officer acting under statutory authority of this state ... " Id.* at 462, quoting MCL 445.904(1)(a). *Smith* concluded that the defendant insurance company's general transactions were specifically authorized by law and as such were exempt from the MCPA.[2] *Smith, supra* at 456. Similarly, defendant in the instant case was specifically authorized by law to make loans, MCL 487.3401, and regulated by the Financial Institutions Bureau of this state as well as federal authorities, MCL 445.1601 *et seq*.

However, MCL 445.904(2)(d) provides an exception for actions filed by individuals challenging acts or practices made unlawful by the Savings Bank Act. Because defendant's actions were unlawful under the Savings Bank Act, an action under the MCPA is not precluded, regardless of the fact that defendant's general activities were specifically authorized, *see Smith, supra* at 467.

---

[2]However, the Court later concluded that defendant's actions fell within the exception and thus, individuals could file a cause of action under the MPCA if the defendant's actions were made unlawful by chapter 20 of the insurance code, MCL 500.2001, *et seq*. *Smith, supra* at 467.

Accordingly, we reverse the decision of the trial court and find that defendant engaged in the unauthorized practice of law when it charged a separate fee for the preparation of legal documents. We remand to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/Jessica R. Cooper
/s/William C. Whitbeck
/s/Michael R. Smolenski

Supreme Court, U.S.
FILED
JAN 22 2002

No. 01-903

In The

Supreme Court of the United States

PATRICIA A. WESTON, on behalf of herself and all others similarly situated,

Petitioner,

v.

AMERIBANK, a state savings bank,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

JOHN J. BURSCH
Counsel of Record
WILLIAM K. HOLMES
MOLLY E. MCFARLANE
WARNER NORCROSS & JUDD LLP
900 Fifth Third Center
111 Lyon Street, N.W.
Grand Rapids, MI 49503
(616) 752-2000

RONALD J. VANDER VEEN
CUNNINGHAM DALMAN, P.C.
321 Settlers Road
Holland, MI 49423
(616) 392-1821

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Does the filing of a class action lawsuit toll the statute of limitations for a class member's individual claim, when that claim is not and could not be asserted by the class representatives?

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent AmeriBank was a Michigan savings bank that was a wholly owned subsidiary of Ottawa Financial Corporation, a publicly traded company. Effective December 8, 2000, AmeriBank was acquired and merged into Fifth Third Bank of Indiana, a wholly owned subsidiary of Fifth Third Bancorp, which is also publicly traded.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

Petitioner, as putative class representative, seeks to resurrect a Truth in Lending Act ("TILA") claim against Respondent filed after the limitations period expired. Petitioner claims the limitations period was tolled by a prior certified class action lawsuit against Respondent in which Petitioner was a class member. The Sixth Circuit ruled against Petitioner and upheld the trial court's dismissal of the TILA claim, because a TILA claim was not, and could not have been, made by the class representatives in the prior lawsuit, making the tolling doctrine inapplicable to Petitioner's TILA claim.

Petitioner asserts a conflict between the Sixth Circuit's decision and decisions of this Court and the Second Circuit. But there is no conflict. The question the Sixth Circuit decided has never been presented to this Court or any federal court until now. The unique, fact-specific nature of this case, and the Sixth Circuit's narrow holding based on those unique facts, make this case particularly ill-suited for Supreme Court review.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS.

On April 1, 1998, Petitioner closed a mortgage loan with Respondent. Pet. App. a3. As part of the closing, Respondent charged Petitioner a $350 document preparation fee. *Id.* Petitioner now claims, in a class action lawsuit filed September 10, 1999, that the document

preparation fee violates the TILA. *Id.* at a3-a4. It is undisputed that the one-year statute of limitations for TILA claims in 15 U.S.C. § 1640(e) applies to this case, and that the limitations period bars Petitioner's complaint unless the statute of limitations is tolled. *Id.* at a5.

Petitioner bases her tolling argument on a class action complaint filed by Paul and Theresa Dressel against Respondent in Michigan state court on December 21, 1998. Pet. App. a3. In that case, the Dressels alleged that Respondent's document preparation fee violated Michigan's usury law and Michigan's statutory prohibition against the unauthorized practice of law. *Id.* The Dressels did not allege a TILA violation. *Id.* The state trial court certified the Dressels' case as a class action on March 22, 1999. *Id.* It then dismissed the case on July 2, 1999, holding that Respondent's document preparation fee did not violate Michigan usury law and did not constitute the unauthorized practice of law. *Id.*

The Dressels moved for reconsideration and sought leave to amend their complaint to include a TILA claim. Pet. App. a3. The state court denied the motion on September 3, 1999, holding that the Dressels' TILA claim was itself barred by the one-year limitations period because the Dressels filed their complaint on December 21, 1998, more than thirteen months after they closed on their November 17, 1997, loan. *Id.* at a3-a4. The attorney who represented the Dressels in the first class action also represents Petitioner here. *Id.* at a4.

II. PROCEEDINGS BELOW.

In this case, Respondent moved in the district court to dismiss Petitioner's complaint on the basis that the one-year statute of limitations in 15 U.S.C. § 1640(e) barred the TILA claim. *Id.* at a4. The district court first held that Petitioner's claim could not proceed as a class action under any circumstances, because tolling does not apply to successor class actions. Pet. App. b12.

The district court then held that the limitations period for Petitioner's individual claim was not tolled by the Dressels' class action lawsuit. The court first noted that "[h]ad [Petitioner] filed this action in a Michigan state court, little doubt exists that her TILA claim would be subject to dismissal." Pet. App. b13. That was because Petitioner's "TILA claim was not asserted in the prior class action," and in fact could not be brought (because the limitations period had expired). Pet. App. b14.

The court next concluded Petitioner's federal claim was barred by *res judicata*, Pet. App. b15-16, and that Petitioner's tolling theory was inapplicable. In reaching this conclusion, the district court stated that the "strong aroma of forum shopping" had caused it "to reject application of a case on which plaintiff heavily relies, *Cullen v. Margiotta*, 811 F.2d 698 (2d Cir. 1987)." Pet. App. b17. The court noted that "unlike *Cullen*'s interpretation of New York law, Michigan courts do not allow tolling where the new case involves different legal theories than those pled in the first case," *id.* at b18, and the court was not inclined to adopt a cross-jurisdictional tolling rule. *Id.* at b17 (citing *Wade v. Danek Medical, Inc.*, 182 F.3d 281 (4th Cir. 1999)). The court also dismissed *Cullen* as a case "of

questionable authority even in the Second Circuit where it was decided." *Id.* at b18.[1]

On appeal, the Sixth Circuit affirmed. For purposes of this Petition, most important are the two issues the Sixth Circuit did *not* address. First, the Sixth Circuit did not discuss the availability of tolling when a class member seeks to file a second class action instead of an individual action. Second, the Sixth Circuit did not discuss the availability of tolling when the claim in the second-filed case was available to the class representatives in the first case, but simply not pled in the complaint. These two irrelevant issues are the ones addressed by Petitioner's cited cases, *Catholic Social Services, Inc. v. INS*, 232 F.3d 1139 (9th Cir. 2000) (en banc), and *Cullen*, respectively. What the Sixth Circuit *did* address was the fact that the Dressels could not have brought a TILA claim in their class action even if they wanted to do so. The Sixth Circuit's holding was thus based *solely* on the unique fact that the TILA claim was not, and could not have been, asserted by the Dressel class representatives:

> Under *American Pipe*[2], the statute of limitations for putative class members of the original class is tolled only for substantive claims that were raised, or could have been raised, in the initial complaint. . . . The Dressel case did not toll the TILA's one-year statute of limitations for [Petitioner]'s TILA claim because the Dressels *did not*

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[1] Petitioner states that the district court did not hold her individual claim time-barred. Pet. at 6. This is incorrect. In discussing Petitioner's individual claim, the district court specifically rejects her tolling argument. Pet. App. at b17-18.

[2] *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974).

> assert a TILA claim and the Dressels *could not* have made a TILA claim in their initial complaint because their complaint was filed after the TILA's one-year statute of limitations had run. Therefore, the district court did not err when it granted summary judgment for [Respondent].

Pet. App. a7 (emphasis added).

REASONS FOR DENYING THE PETITION

No compelling ground exists for granting certiorari in this case. The issue presented is whether the filing of a class action lawsuit tolls the statute of limitations for a class member's individual claim, when that claim is not, and could not be, asserted by the class representatives. The Sixth Circuit recognized the purpose of the class action tolling doctrine – to avoid unnecessary filings of repetitious lawsuits by class members – and concluded, correctly, that such purpose was not served by allowing a party to belatedly file a claim that was not, and could not have been, made in the first lawsuit.

Petitioner mischaracterizes the Sixth Circuit's decision in attempting to manufacture a split between the Sixth Circuit and the Second Circuit, and between the Sixth Circuit and this Court. The Sixth Circuit did not "reject[ ] the district court's acknowledgment that 'the filing of a class complaint tolls the statute of limitations for absent class members, both for claims actually alleged and those growing out of the same conduct, transaction, and occurrence.' " Pet. at 8. The court held only that the tolling doctrine is inapplicable where the claim asserted

in the second lawsuit was not, and could not have been, asserted in the first lawsuit.

The Sixth Circuit's conclusion regarding tolling was grounded in the very narrow factual situation presented by this unique case. As a result, when presented with the broader question of tolling involving an *available* claim not pled in a prior class action lawsuit, the court may or may not reach the same conclusion as the Second Circuit. That point strips Petitioner's asserted conflict of all relevance to the question of certiorari. What the Sixth Circuit would do in the future when presented with Petitioner's hypothetical issue is irrelevant to the outcome of this case.

I. BECAUSE THIS CASE PRESENTS AN ISSUE OF FIRST IMPRESSION IN THE COURTS OF APPEALS, IT IS ILL-SUITED FOR SUPREME COURT REVIEW.

No other court of appeals has considered whether the filing of an initial class action lawsuit can toll the statute of limitations for a claim asserted in a second class action lawsuit, where the claim in the second suit was not, and could not have been, raised in the first suit. The unique facts of this case make it inappropriate for Supreme Court review for three reasons.

A. The Courts of Appeals Are Not in Conflict with Each Other or With This Court.

A core ground for granting certiorari is a conflict among the courts of appeals. *See Northwest Airlines, Inc. v.*

Duncan, 531 U.S. 1058, 121 S. Ct. 650, 650 (2000) (O'Connor, J., dissenting from denial of certiorari) ("The Courts of Appeals . . . have taken directly conflicting positions on this question.") That is the sole ground on which Petitioner bases her Petition. But the issue presented here is one of first impression in the courts of appeals (or any other federal court), and there is thus no conflict among them.

The Sixth Circuit ruled that a certified class action lawsuit cannot toll the statute of limitations for a claim asserted in a second class action, where the subsequent claim was not, and could not have been, raised in the first class action. No other federal court has addressed this question.

While the Second Circuit in *Cullen* noted that a claim in a second-filed lawsuit need not necessarily be identical to a claim in a first-filed class action for the tolling doctrine to apply, 811 F.2d at 721, the court did *not* consider the situation here, where the claim in the second-filed lawsuit *could not* have been raised in the first-filed lawsuit. Just the opposite, two of the *Cullen* class representatives were also the class representatives in the first-filed suit; those plaintiffs obviously could have raised the same claims in either lawsuit. Thus, because *Cullen* does not even address the issue presented here, the Sixth Circuit's decision could not have created a conflict with it.

Likewise, the Sixth Circuit's decision is not inconsistent with this Court's decisions in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), and *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983). Those cases

hold only that the commencement of a class action suit tolls the applicable statute of limitations for all class members who make timely motions to intervene upon denial of certification, and for all class members who bring individual actions after class certification is denied. The decisions do not discuss whether the second action can be certified as a class (the issue addressed in *Catholic Social Services*), whether the claims in the second action must have been presented in the first action (the issue addressed in *Cullen*), or whether the claims in the second action must have been available to the class representatives in the first action (the issue presented here). The Sixth Circuit's decision therefore could not have created a conflict with this Court either.

B. An Issue of Immediate Public Importance Is Not Presented.

A second core ground for granting certiorari is the public importance the issue presents. *See Rice v. Sioux City Mem'l Park Cemetery, Inc.*, 349 U.S. 70, 79 (1955) ("[T]he question was of importance merely to the litigants and did not present an issue of immediate public significance."). In the circumstances presented here, however, the unique factual nature of this case evidences its lack of immediate public importance. Petitioner does not argue otherwise.

The result in the Sixth Circuit turned on the exceptional fact that Petitioner's claim could not have been asserted by her class representatives in the first class action suit. This is a unique situation. In fact, from 1974, the year this Court first articulated the class action tolling

doctrine in *American Pipe*, up to the date of this filing, no reported federal court decision has ever addressed the issue decided by the Sixth Circuit. Certainly, if the narrow tolling question this case presents raised important and far-reaching issues, it would have been before the courts of appeals, or at least before district courts, numerous times during those 25 years. Not a single reported decision indicates that this issue has surfaced before.

Far from presenting an issue of immediate public importance, the Sixth Circuit's holding is a narrow one, of interest only to this case. The decision neither changes the law nor modifies existing precedent. Review by this Court is therefore unwarranted.

C. The Issue Presented Is Not Mature.

This Court often practices judicial restraint, waiting until an issue matures through study and interpretation by a number of lower courts before it undertakes review of the issue. *See Durden v. California*, 121 S. Ct. 1183, 1183 (2001) (Souter, J., dissenting from denial of certiorari) ("[R]ulings by other courts . . . would be valuable to us in any examination of the issue we might ultimately give it."); *Lackey v. Texas*, 514 U.S. 1045, 115 S. Ct. 1421, 1422 (1995) (Stevens, J., respecting denial of certiorari) ("[A] denial of certiorari on a novel issue will permit the state and federal courts to 'serve as laboratories in which the issue receives further study before it is addressed by this Court.' " (quoting *McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J., respecting denial of certiorari))).

Here, the Court's practice of judicial restraint would be wisely exercised. This case presents an issue of first impression. A three-judge panel decided the case in a unanimous decision. Petitioner did not seek reconsideration or an *en banc* hearing. The issue presented has not been studied by any other federal court, let alone several. The issue presented is therefore not mature and is ill-suited for Supreme Court review. *Cf. Northwest Airlines*, 121 S. Ct. at 651 (O'Connor, J., dissenting from denial of certiorari) ("The legal issue is . . . well suited for resolution by this Court. The two leading cases . . . are both the product of en banc consideration. They have fully explained the relevant considerations, including the language and history of the ADA and its pre-emption clause, as well as the policies supporting the possible interpretations. . . . "). This Court should allow this issue of first impression to mature through further consideration in the laboratories of the lower courts, if in fact the issue is of sufficient importance to even reach that stage.

II. THE SECOND CIRCUIT'S DECISION IN *CULLEN* IS IMMATERIAL TO THE PETITION.

As explained, the Sixth Circuit's decision below does not conflict with the Second Circuit's statements in *Cullen* because the two cases do not deal with the same issue. Whereas the Sixth Circuit was faced with the tolling of a claim that was not, and could not be, brought in the first-filed class action lawsuit, the Second Circuit was faced with claims that the plaintiffs could have brought in the first-filed class action lawsuit (since two of the class representative plaintiffs were also class representatives in

the first-filed case), but which the plaintiffs chose not to plead. The Second Circuit was not faced with the issue presented here. *See Korwek v. Hunt*, 827 F.2d 874, 877 (2d Cir. 1987) (noting that *Cullen* was based "on an analysis of a *single* issue – whether the state action was sufficiently related to the federal action to warrant invocation of *American Pipe*").

The Second Circuit's discussion in *Cullen* is also distinguishable for an additional reason that further demonstrates the unique and fact-specific nature of Petitioner's case, and the narrowness of the Sixth Circuit's holding.

The first-filed class action lawsuit in *Cullen* was never certified, as the class in the Dressels' lawsuit was. The *Cullen* court relied on that absence of certification in concluding the second-filed claims had been tolled, reasoning that a class member is not bound by a class representative's choice of legal claims until certification:

> Not until a class is certified "does a class member have any duty to take note of the suit or to exercise any responsibility with respect to it. . . . " *An absent putative class member in an action where a class was never certified thus is not legally bound* either *by the named plaintiffs' choice of legal claims* or by a dismissal for failure to allege sufficient facts to state a cause of action, even if that dismissal would have res judicata effect against the named plaintiffs.

811 F.2d at 719 (quoting *American Pipe*, 414 U.S. at 552) (emphasis added). In contrast, the Dressels' lawsuit *was* certified as a class action (and then dismissed). Pet. App. a3. In the Second Circuit's words, Petitioner was thus "legally bound . . . by the named plaintiffs' choice of legal

claims," which did *not* include a TILA claim. That reasoning does not conflict with but rather supports the result the Sixth Circuit reached in this case, and it further illustrates the underlying factual differences that distinguish this case from *Cullen*.

III. THIS COURT'S DECISIONS IN *AMERICAN PIPE* AND *CROWN, CORK* AFFIRM THE CORRECTNESS OF THE SIXTH CIRCUIT BELOW.

The Sixth Circuit correctly concluded Petitioner's TILA claim was not tolled by the Dressels' class action because the TILA claim was not, and could not have been, raised by the Dressels, the class representatives. The Sixth Circuit's conclusion is consistent with the two cases on which it relied, i.e., this Court's decisions in *American Pipe* and *Crown, Cork*.

American Pipe involved a civil antitrust action where the district court, after denying class certification, denied as untimely purported class members' various motions to intervene. The Ninth Circuit reversed, and this Court agreed, ruling that the motions to intervene were not time-barred. This Court reasoned that if the filing of a class action did not toll the statute of limitations, potential class members would file motions to intervene or to join to protect themselves in case certification was denied. 414 U.S. at 553. That rush to the courthouse would frustrate the principal purposes of the class action procedure, which are to promote efficiency and economy of litigation. *Id.* Thus, this Court held that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class

who would have been parties had the suit been permitted to continue as a class action." *Id.* at 554. To some extent, the holding was confined to the facts before the Court, as the opinion indicates it applies "at least where class action status has been denied *solely because of failure to demonstrate that 'the class is so numerous that joinder of all members is impracticable.'* " *Id.* at 552-53 (emphasis added).

Nine years later, in *Crown, Cork,* this Court expanded slightly on the *American Pipe* holding, concluding that a class action filing tolls the statute of limitations as to all asserted class members, whether they choose to intervene *or* file "individual actions" following the denial of certification. *Crown, Cork,* 462 U.S. at 346. This Court noted that while "[l]imitation periods are intended to put defendants on notice of adverse claims and to prevent plaintiffs from sleeping on their rights, . . . these ends are met when a class action is commenced. Class members who do not file suit while the class action is pending cannot be accused of sleeping on their rights." *Id.* at 352 (citations omitted). The key to this model for class action procedure was the ability of class members to rely on the class representatives to present the class claims. *Id.* at 352-53 ("Rule 23 both permits and encourages class members to rely on the named plaintiffs to press their claims."); *id.* at 350 ("unless the statute of limitations was tolled by the filing of the class action, class members would not be able to rely on the existence of the suit to protect their rights."). This Court thus concluded, as it did in *American Pipe,* that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been

parties had the suit been permitted to continue as a class action." *Id.* at 353-54 (quoting *American Pipe*, 414 U.S. at 554).

In both *American Pipe* and *Crown, Cork*, various members of this Court warned of the danger in allowing the tolling doctrine to be expanded too broadly. In *American Pipe*, Justice Blackmun wrote in a concurrence that the decision "must not be regarded as encouragement to lawyers in a case of this kind to frame their pleadings as a class action, intentionally, to attract and save members of the purported class who have slept on their rights." 414 U.S. at 561 (Blackmun, J., concurring). Similarly in *Crown, Cork*, Justice Powell's concurrence, joined by Justices Rehnquist and O'Connor, confirms "[t]he tolling rule of *American Pipe* is a generous one, inviting abuse. . . . The rule should not be read . . . as leaving a plaintiff free to raise different or peripheral claims following denial of class status." 462 U.S. at 354 (Powell, J., concurring).

The Sixth Circuit in its analysis started with a reiteration of this Court's pronouncements in *American Pipe* and *Crown, Cork*. Pet. App. a5-a6. The court then held Petitioner's TILA claim barred because it was "separate and distinct" from the state law claims the Dressels raised:

> Under *American Pipe*, the statute of limitations for putative class members of the original class is tolled only for substantive claims that were raised, or could have been raised, in the initial complaint. . . . The Dressel case did not toll the TILA's one-year statute of limitations for [Petitioner]'s TILA claim because the Dressels *did not*

> assert a TILA claim and the Dressels *could not* have made a TILA claim. . . .

Pet. App. a7 (emphasis added).

The Sixth Circuit's holding comports with *American Pipe* and *Crown, Cork*. Those cases were designed to encourage class members to rely on named plaintiffs to pursue class claims, instead of filing repetitious individual claims. *Crown, Cork*, 462 U.S. at 350, 352-53. But here, Petitioner could not have been relying on the Dressels to protect and assert her TILA claim. The Dressels did not make a TILA claim, and indeed, *had* no TILA claim. In this situation, there is no policy of efficiency or economy that militates against the filing of a second lawsuit, or against the filing of a motion to intervene in the first suit. Just the opposite, judicial efficiency and economy dictate that the excluded TILA claim be brought immediately, rather than years after the fact, after a dismissal on the merits and in a different forum. Thus, a potential class member like Petitioner, who was or should have been aware the Dressels had not pled a TILA claim,[3] sleeps on her rights in failing to bring a second action or moving to intervene. Stated another way, the policy rationale underlying this Court's decisions in both *American Pipe* and *Crown, Cork* – a class member's ability to rely on the class representatives to assert the member's claims – is not present when those claims are not and cannot be asserted by the class representatives.

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[3] Because Petitioner and the Dressels share the same attorney, Petitioner cannot be heard to argue that she was unaware the Dressels failed to file a TILA claim as part of their class action.

Petitioner raises a red herring in discussing "the analysis that courts are to adopt when a second plaintiff raises claims that were not made in the initial suit." Pet. at 13-14. As a preliminary matter, Petitioner does not rely on the majority opinions in *American Pipe* and *Crown, Cork*, but rather on the concurring opinions. More fundamentally, Petitioner's analysis does not acknowledge the unique factual scenario this case presents, where the second-filed claim could never have been pled by the class representatives in the initial class action lawsuit. Petitioner's discussion is therefore entirely irrelevant to the issue this case actually presents. The same is true when Petitioner discusses the Second Circuit's decision in *Cullen* (Pet. at 15-16), which similarly did not raise the issue of a second-filed claim that was not, and could not have been, raised in a first-filed class action.

In sum, the Sixth Circuit correctly concluded the class action tolling doctrine does not apply to a class member's claims that were not, and could not be, asserted in the first-filed class action. No decision of this Court is in conflict with that conclusion, and no other court of appeals has even studied the question; it is an issue of first impression in any federal court. The Sixth Circuit's narrow holding is intrinsically intertwined with the unique factual situation presented here, evidencing the case's lack of importance. Accordingly, the Petition should be denied.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

JOHN J. BURSCH
Counsel of Record
WILLIAM K. HOLMES
MOLLY E. MCFARLANE
WARNER NORCROSS & JUDD LLP
900 Fifth Third Center
111 Lyon Street, N.W.
Grand Rapids, MI 49503
(616) 752-2000

RONALD J. VANDER VEEN
CUNNINGHAM DALMAN, P.C.
321 Settlers Road
Holland, MI 49423
(616) 392-1821

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In The
Supreme Court of The United States

PATRICIA A. WESTON, on behalf of herself and all others similarly situated,

Petitioner,

v.

AMERIBANK, a State Savings Bank,

Respondent.

Petition for a Writ of Certiorari From The United States Court of Appeals for the Sixth Circuit

REPLY BRIEF OF PETITIONER

*John E. Anding (P30356)
Christopher G. Hastings (P40861)
Drew, Cooper & Anding
125 Ottawa Avenue, N.W.
Suite 300, Ledyard Building
Grand Rapids, Michigan 49503
616/454-8300
*Counsel of Record

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REPLY BRIEF OF PETITIONER

The core of Respondent AmeriBank's opposition to the Dressel's Petition is the alleged "distinction" between this case and Cullen v. Margiotta, 811 F.2d 698 (2nd Cir. 1987) growing out of the Sixth Circuit's observation that "the Dressels did not assert a TILA claim and the Dressels could not have made a TILA claim." Pet. App. A-7. Respondent's arguments (presented here in reverse order for reasons that shall become apparent) are (a) that the Sixth Circuit's determination that Weston's claims were time-barred is consistent with this Court's Opinions in American Pipe and Construction Co. v. Utah, 414 US 538 (1974) and Crown Cork & Seal v. Parker, 462 US 345 (1983) and (b) that the time bar applicable to the Dressels' TILA claim creates a

distinction between this case and the Second Circuit's decision in Cullen.

In fact, American Pipe and Crown Cork are clear that a putative class member has no duty to assert claims during the pendency of an original class suit under any circumstances, and cannot be accused of sleeping on her rights. As such, the "fact" that the Dressels' TILA claim was time-barred does not render the Sixth Circuit's decision consistent with American Pipe and Crown Cork, and by the same token will not support a "distinction" between this case and Cullen, thus the conflict between the Sixth and Second Circuits remains.

I.
CROWN CORK AND AMERICAN PIPE ESTABLISH THAT PUTATIVE CLASS MEMBERS HAVE NO INVESTIGATORY DUTY AND CANNOT BE DEEMED TO HAVE SLEPT ON THEIR RIGHTS

Respondent's Brief states that a class member such as Weston had a duty to determine whether the Dressels had asserted or could assert a Truth in Lending claim, failing which she "slept on her rights." Res. Brf. p. 15.[1] American Pipe and Crown Cork establish this is not the case:

> Not until the existence and limits of the class have been established and notice of membership has been sent does a class member have any duty to take note of the suit or to exercise any responsibility with respect to it . . . .

American Pipe, 414 U.S. at 551.

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[1] Respondent suggests the Dressels never asserted a TILA claim and could not assert a TILA claim because of the time bar. Both suggestions are wrong. The Dressels, in fact, sought to amend their complaint to assert a TILA claim, whereupon AmeriBank asserted the affirmative defense of limitations. Had the affirmative defense not been asserted, it would have been waived. Fed. R. Civ. P. 8(c); Senter v. General Motors, 532 F. 2d 511, 530 (6th Cir. 1976)

> [C]lass members who do not file suit while the class action is pending cannot be accused of sleeping on their rights.

Crown Cork, 462 U.S. at 352. Weston had no duty to investigate the scope of the Dressels' claims.[2]

II.
BECAUSE THERE IS NO MEANINGFUL DISTINCTION BETWEEN THIS CASE AND CULLEN, THERE IS A CONFLICT BETWEEN THE SECOND AND SIXTH CIRCUITS

Because Weston had no duty to do anything to protect her rights in light of the unambiguous language of American Pipe and Crown Cork & Seal, the fact that the Dressels had not asserted a TILA claim cannot form the basis for distinguishing this case from Cullen. Here, as in Cullen, the issue properly before the lower courts was exactly what Respondent itself says it was in Cullen: whether

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[2] Perhaps in recognition of this, Respondent suggests Weston had **actual** knowledge of the Dressels' claims because she has the same attorney. This would only be true if undersigned counsel represented Weston individually before dismissal of Dressel.

second action was sufficiently related to the first to warrant invocation of American Pipe. Res. Brf. p. 11.

Respondent's other effort to distinguish Cullen is based upon the district court's initial ruling that Weston's claim, although not time barred, was subject to *res judicata* because of the actual adjudication and dismissal of Dressel.[3] This is plainly wrong on either of two fronts. First, Dressel was not finally adjudicated, and, as pointed out in Weston's initial brief, the initial dismissal was reversed and the case reinstated. Dressel v. AmeriBank, 247 Mich App 133, 635 NW 2d. 328 (2001), Appendix C to Weston's petition. Further, no class notice ever went out in Dressel, and as American Pipe makes clear, until a class member receives a class notice and an

[3] The district court's *sua sponte* ruling in this regard has never been defended by AmeriBank before, and was ignored by the Sixth Circuit.

opportunity to opt in or out of the class, she cannot be bound by the initial class suit.

III.
CONCLUSION

Respondent's Brief serves only to underline the error in the Sixth Circuit's opinions.

Respectfully submitted,

DREW, COOPER & ANDING

By: _____
John E. Anding (P30356)
Christopher G. Hastings (P40861)
Business Address:
125 Ottawa Avenue, N.W.
Suite 300, Ledyard Building
Grand Rapids, Michigan 49503
Telephone: 616/454-8300

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